1516 No. 5126 1510

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. B. MACOMBER,
Plaintiff in Error,

vs.

J. O. GOLDTHWAITE,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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Subject Index

	Page
Statement of case	1
Assignment of errors	11
Argument	27
Point I. Assignment of errors I to VI, inc.	27
Point II. Assignment of error VII	42
Point III. Assignment of errors VIII to X, inc.	43
Point IV. Assignment of error XI	53
Point V. Assignment of error XII	53
Point VI. Assignment of error XIII	54

Table of Authorities Cited

Pages

Abraham v. Oregon & C. R. Co., 37 Ore. 495, 82 A. S. R. 779, 64 L. R. A. 391, 60 Pac. 899 39

Bryan v. Idaho Quartz Mining Co., 73 Cal. 249, 14 Pac. 859 36

Buchtel v. Evans, 21 Ore. 312, 28 Pac. 67 30

Colvin v. Goff, 82 Ore. 314 36

Coos Bay R. R. Co. v. Siglin, 26 Ore. 390, 38 Pac. 192 30

Davis Calyx Drill Co. v. Mallory, 137 Fed. 332, 69 L. R. A. 973 40

Dollar v. International Corporation, 13 Cal. App. 331, 109 Pac. 499 ..... 37, 42

Dunlap v. Lewis, 64 Ore. 482, 130 Pac. 973 40

Ferguson v. McBean, 91 Cal. 63 37

Gill v. General Electric Co., 129 Fed. 349 37

Gump v. Holberstadt, 15 Ore. 358, 15 Pac. 467 41

Knahtla v. O. S. L. R. Co., 21 Ore. 137, 27 Pac. 91 30

McConnell v. Gordon Const. Co., 105 Wash. 659, 178, 823 40

Meyer v. Everett Pulp, etc. Co., 193 Fed. 857, 113 C. C. A. 643 (9th Circuit) 40

Miller v. Lynch, 17 Ore. 61, 19 Pac. 845 41

Nickell v. Bradshaw, (Ore.), 183 Pac. 13 37

Pastene v. Pardini, 135 Cal. 431, 67 Pac. 681 30

Pon v. Wittman, 147 Cal. 280, 81 Pac. 984 53

Ruckman v. Imbler Lbr. Co., 42 Ore. 231 36

Sharon v. Sharon, 68 Cal. 29, 8 Pac. 614 30

Smith v. Baer, 46 Ore. 143, 79 Pac. 497, 114 A. S. R. 858 36

Smith v. Caro & Boune, 9 Ore. 278 37

Swift v. Occidental L. & P. Co., 141 Cal. 161, 74 Pac. 700 36

Troy Laundry Co. v. Henry, 23 Ore. 237, 31 Pac. 484 30

United Iron Works v. Outer H. etc. Co., 168 Cal. 81, 141 Pac. 917 39

Williams v. Mt. Hood Ry. & Power Co., 57 Ore. 251, Ann. Cases 1913-A, 177 36

Wilson v. Wilson, 26 Ore. 251 37

Winters v. Rush, 34 Cal. 136 30

Text Books and Other Authorities Cited

Pages

Civil Code of California, Sec. 1624 40
Civil Code of California, Sec. 1625 38
Civil Code of California, Sec. 1647 39
Civil Code of California, Sec. 3109 29
Corpus Juris, Volume 8, Bills & Notes, 965, Sec. 1265 29
Corpus Juris, Volume 22, Sec. 1380, page 1070 34
Corpus Juris, Volume 22, Sec. 1381, page 1075 34
Corpus Juris, Volume 22, Sec. 1443, page 1089 34
Corpus Juris, Volume 22, Sec. 1445, page 1091 35
Corpus Juris, Volume 22, Sec. 1530, page 1144 35
Corpus Juris, Volume 22, Sec. 1542, page 1152 35
Corpus Juris, Volume 22, Sec. 1570, page 1177 36
Corpus Juris, Volume 22, Sec. 1571, page 1179 36

Ency. of Evidence, Volume 9, Parol Evidence, pages 321, 325, 326 .... 31, 32

Jones on Evidence, Proof of Guaranty, Volume 3, Sec. 427 41
Jones on Evidence, Volume 3, Sec. 494 37

Lord's Oregon Laws, Volume 1, Sec. 73 29
Lord's Oregon Laws, Sec. 713 38
Lord's Oregon Laws, Sec. 714 38
Lord's Oregon Laws, Sec. 808 40
Lord's Oregon Laws, Sec. 5893 37
L. R. A. 1917C, page 300 36

Modern Law of Evidence, Chamberlayne, Sec. 3548 36

Stearns on Suretyship, Sec. 35, page 45 41

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

F. B. Macomber, plaintiff in error, up to the 14th day of December, 1921, was president and director of the Macomber-Savidge Lumber Company, which was a California corporation, engaged in the business of buying and selling lumber at San Francisco, California, and was a large stockholder in said company. (Trans. page 128.)

On the 14th day of December, 1921, all of the stockholders of the said Macomber-Savidge Lumber Company, which was financially embarrassed and unable to pay its debts, entered into an agreement of liquidation in which they appointed William C. Crittenden of San Francisco, California, trustee for, and on behalf of the *officers, directors* and *stockholders* of said corporation and the corporation to receive any and all

funds that may be due said corporation and deposit the same in a named bank, to pay off the indebtedness of the company and to pay whatever balance that remained to the stockholders. (Trans. pages 127 to 133 inc.)

They also agreed in said agreement that the business conducted by said corporation was to be *closed* on the 15th day of December, 1921, and that the trustee should sell before the 30th of December, 1921, the furniture and equipment of the office. (Trans. page 129 (4).)

It was further provided in said agreement that the said trustee shall not

> "accept any sum less than the full *face valuation* of any obligation due said corporation *unless he have the written consent of both F. B. Macomber and George J. Sivers.*" (Trans. pages 131, 132.)

It was further provided in the said agreement that during the pendency of the proceedings necessary to carry out the terms of the agreement that

> "none of said parties were to transact any business for or on behalf of the corporation, save and except the holding of a meeting for the purpose of authorizing and carrying out such steps as were necessary to enable the terms of the agreement to be complied with." (Trans. pages 132, 133.)

Mr. Crittenden accepted his appointment as trustee (Trans. pages 133, 134) and immediately after the execution of the agreement aforesaid entered upon his duties of liquidating the affairs of the Macomber-Savidge Lumber Company. He continued this work until February 21, 1922, when he resigned and was

succeeded by Irving H. Sanborn, Vice President of the American National Bank of San Francisco, who was authorized by written agreement of February 21, 1922, of Macomber-Savidge Lumber Company and its stockholders to be substituted as trustee instead of William C. Crittenden. (Trans. page 326.)

The said Macomber-Savidge Lumber Company and its stockholders by said assignment, assigned and transferred to the said Irving H. Sanborn, as trustee, all of its assets and accounts, including its account against the Modoc Lumber Company, hereinafter named, and authorized him to proceed to realize upon said assets as promptly as possible—to convert the same into money, and provided that the agreement of December 14, 1921, to wit, Plaintiff's Exhibit 11 (Trans. page 127), should be changed *only* in regard to *trustees* and *payments* and that this was done by execution of this latter agreement. (Trans. page 326.) By this latter agreement, the provision in the former agreement which stipulated that Macomber and Sivers were to *consent* in *writing* to the trustee accepting any sum less than the *full face* value of any obligation due said corporation was left in force, and none of the stockholders were given back any of the powers, which had been taken away by the former agreement.

J. O. Goldthwaite, defendant herein, was at the time of the making of said agreements, the executing of the notes to plaintiff in error, sued upon herein, and the filing of the above entitled case, a resident of Klamath Falls, Oregon, and was then and for a long time preceding, had been the president of the Modoc

Lumber Company, an Oregon corporation, which was engaged in the business of manufacturing lumber and the sale thereof at Klamath Falls, Oregon. He, at the time of signing the notes to plaintiff, hereinafter referred to, was, and had been, for a considerable period of time, the owner of all the capital stock of the Modoc Lumber Company, except two shares necessary to qualify its other directors. (Trans. page 138.) He continued as president and a principal stockholder of the Modoc Lumber Company up to March 8, 1925. (Trans. page 140.)

In July, 1921, the Modoc Lumber Company, being financially embarrassed, placed its affairs in the hands of the Board of Trade of San Francisco, California. (Trans. page 141.)

The Williamson River Logging Company was a subsidiary property of the Modoc Lumber Company and handled the logging end of the operation. (Trans. page 143.)

During the years 1920 to 1921, the Macomber-Savidge Lumber Company bought of the Modoc Lumber Company, a large amount of lumber to remain in the yards of the latter company, subject to the shipping orders of the former company, for which the Macomber-Savidge Lumber Company issued trade acceptances under a contract with the said Modoc Lumber Company that when the lumber was shipped and sold that the Modoc Lumber Company would pay to Macomber-Savidge Lumber Company the difference between the face value of the trade acceptances and the prices at which the same were sold by the Macom-

ber-Savidge Lumber Company. (Trans. pages 139-140.) These trade acceptances were sold by the Modoc Lumber Company and the Macomber-Savidge Lumber Company was compelled to pay them. The lumber bought by the Macomber-Savidge Lumber Company experienced a falling market, and the sales resulted in a heavy loss, and therefore the Modoc Lumber Company became indebted to Macomber-Savidge Lumber Company in a large sum. This sum so owed by the Modoc Lumber Company to the Macomber-Savidge Lumber Company was, on or about the 2nd day of March, 1922, agreed as being $71,000.00. (Testimony, F. B. Macomber, Trans. pages 145-150.) Statement of Court. (Trans. page 268.)

The Modoc Lumber Company, and its subsidiary, the Williamson River Logging Company, having placed their affairs in the hands of the San Francisco Board of Trade, as aforesaid, also assigned at the same time to the said San Francisco Board of Trade, its equity in the Modoc Lumber Company and the Williamson River Logging Company, together with the control of the stock in both corporations. After the said assignment, J. O. Goldthwaite, defendant in error, approached L. B. Menefee of Portland, Oregon, to loan the said Modoc Lumber Company the sum of $250,000.00 secured by first mortgage on the plant and property of the Modoc Lumber Company and the Williamson River Logging Company. Before Mr. Menefee would make the loan, he insisted that the unsecured creditors of the Modoc Lumber Company—some one hundred and ten in number, of which the Macomber-Savidge Lumber Company was the largest,

with its claim of $71,000.00—should be gotten together and the time for the payment of the claims extended. Mr. Menefee made a further condition that the amount of the creditors' claims should be secured by second mortgage and that the said amount of the creditors' claims filed should not exceed the *sum of $178,582.00.* (Trans. pages 142, 143, 144, 206, 207, 208, 209.)

During the period of these negotiations, the San Francisco Board of Trade and Mr. Goldthwaite, the defendant in error, succeeded in obtaining the consent of practically all the creditors, with the exception of F. B. Macomber, plaintiff in error (see testimony of J. O. Goldthwaite, Trans. pages 142, 143, 144, 206, 207, 208), and to secure the success of the negotiations of Mr. Menefee, it was necessary for J. O. Goldthwaite, defendant in error, to not only secure the filing of the Macomber claim with the San Francisco Board of Trade, but in addition to that it was necessary to have the claim divided in such a manner that the claim put in with the Board of Trade would amount to about $53,000.00, instead of $71,000.00. (Trans. page 218.) If F. B. Macomber would not consent, as provided in Plaintiff's Exhibit 11, (Trans. page 127), to the trustee of the Macomber-Savidge Lumber Company reducing the claim, as aforesaid, and filing it with the said Board of Trade, defendant in error would not be able to comply with Mr. Menefee's demands of reducing the amount of the creditors' claims to the sum of $178,582.00 hereinbefore mentioned. Upon Macomber's said consent as *an individual,* depended the success of the negotiations aforesaid.

In an attempt to comply with Mr. Menefee's conditions aforesaid, between the dates of December 15, 1921, and March 3, 1922, and during the time in which the Macomber-Savidge Lumber Company was in the process of liquidation and in the hands of its assignees and trustees, and while Mr. F. B. Macomber, plaintiff in error herein, had, under the terms of the agreement hereinbefore cited, no power either as an officer or a stockholder, to do anything but to *consent on his own behalf* that the bill owing by the Modoc Lumber Company to the Macomber-Savidge Lumber Company be divided as aforesaid, and/or to consent to its filing with the San Francisco Board of Trade,—J. O. Goldthwaite, the defendant in error, *knowing* that the company was in the hands of an assignee and trustee (testimony of J. O. Goldthwaite, pages 153, 210, 212, 213), undertook negotiations with F. B. Macomber, plaintiff in error, to obtain his consent to the trustee filing a claim in bankruptcy in the reduced amount of $53,000.00.

Mr. Macomber, on February 28, 1922, agreed to, as far as he was concerned, and in accordance with the only powers that he had left under the trustee agreement aforesaid to *consent* to the division and reduction of the claim of the Macomber-Savidge Lumber Company and to *consent* to the filing by the trustee of part of said claim in the sum of about $53,000.00 if J. O. Goldthwaite, defendant in error, would approve the entire amount owing by his company to Macomber-Savidge Lumber Company, and would personally give his individual ten notes to F. B. Macomber as an

individual in the sum of $5000.00 each for obtaining the individual consent of Mr. Macomber to the loss to his individual interest, which would result because of the loss of the immediate right to proceed against the debtor, because of the allowing the Menefee interests priority in security between the mortgages, and also because it would effectuate the giving up by the Macomber-Savidge Lumber Company of a right to have the balance of its claim, to wit about $18,000.00 secured, postponing it to a third and inferior position and thus involving Macomber in an individual loss. This was agreed to by Mr. J. O. Goldthwaite, and the agreement so reached was reduced to writing, a copy of which agreement is as follows:

"February 28, 1922.

Mr. J. O. Goldthwaite,
Aspgrove, Oregon,
Dear Sir:

Referring to our conversation to-day and our *personal agreement* in connection with the *claim* of the Macomber Savidge Lumber Co. *against* the Modoc Lumber Co. which has developed through the purchase of lumber under certain agreements and guarantees:

You hereby approve the claim of the Macomber Savidge Lumber Co. as submitted with the understanding that all items of interest on Trade Acceptances still unpaid are to be added to this account, and I hereby agree *that any and all payments made by the Modoc Lumber Co. either direct or through the San Francisco Board of Trade,* are to apply against *the personal notes given* to me by you to the amount of said notes.

Yours very truly,

F. B. Macomber,

Approved: J. O. Goldthwaite."

The next day, to wit, March 1, 1922, defendant signed and delivered to F. B. Macomber, plaintiff in error, the said ten (10) individual notes, all of which were dated of said date. The first of said notes was made to fall due September 1, 1922, and the remaining notes respectively, January 1, 1923, April 1, 1923, July 1, 1923, October 1, 1923, January 1, 1924, April 1, 1924, July 1, 1924, October 1, 1924, and January 1, 1925. (See Plaintiff's Exhibits 1 to 10 inc., Trans. pp. 106 to 109 inc.)

For more convenient reference hereto the form of the notes so executed is set forth as follows:

$5,000.00

San Francisco, Calif.
March 1, 1922

On or before September 1st, 1922, after date I promise to pay to the order of F. B. Macomber five thousand and no/100 dollars at 806 Hobart Bldg., San Francisco *Value received* with interest at 6% per annum.

No.................... Due....................

J. O. GOLDTHWAITE."

(Documentary United States Internal Revenue $1.00 on back.)

After thus securing the said consent of F. B. Macomber as an individual as required by the agreement of stockholders aforesaid, the trustee of the Macomber-Savidge Lumber Company, on or about the 26th day of May, 1922, filed the said reduced claim of the Macomber-Savidge Lumber Company with the Board of Trade of San Francisco, State of California, and thereafter, in accordance with the general plan aforesaid outlined by defendant Goldthwaite, the Menefee interests of Portland, Oregon, advanced to

the Modoc Lumber Company aforesaid the sum of $250,000.00 and took a first mortgage over all of the assets of the Modoc Lumber Company and its subsidiary, the Williamson River Logging Company and the Board of Trade of San Francisco, California, took a second mortgage from the Modoc Lumber Company and the said Williamson River Logging Company in the sum of about $178,582.00 secured by deed of trust. Thereupon the said Modoc Lumber Company with the proceeds thus derived from the Menefee interests and the postponement of any action against them by the said one hundred and ten (110) creditors resumed their mill operations for a comparatively short period and then closed down.

On or about the 4th day of September, 1924, the Board of Trade of San Francisco sold its claims against the Modoc Lumber Company which were secured by second mortgage to the Menefee interests for the sum of $53,577.78, which was divided among the creditors. From this sum, the trustee of the Macomber-Savidge Lumber Company received the sum of about $16,500.00, and F. B. Macomber, plaintiff in error herein, in accordance with his personal agreement that any and all payments made by the Modoc Lumber Company were to apply upon the personal notes given by J. O. Goldthwaite as an individual to F. B. Macomber as an individual applied the amounts upon the said notes. Thereafter, plaintiff in error, through his attorneys, made written demand upon the said defendant in error for the payment of the notes hereinbefore described, and no payment having been made filed suit in the District Court of the

United States for the District of Oregon against the defendant. Trial was had of the said case on the 22nd day of April, 1926, before the court without a jury and a judgment was rendered in favor of the defendant in error, and from said judgment, the plaintiff in error has brought said judgment to this court by writ of error.

ASSIGNMENTS OF ERROR.

The errors asserted and relied upon by plaintiff (plaintiff in error) are as follows (Trans. pages 80 to 99):

I.

The Court erred in refusing to sustain and in overruling the plaintiff's objection to plaintiff testifying under cross-examination, in answer to the following questions propounded by counsel for defendant, to wit:

> "Was there any argument between you, or differences, as to whether you would put your claim into the Board of Trade, or that of your company, at that time?
>
> A. Any argument with whom?
>
> Q. Between Mr. Goldthwaite and yourself, as to whether or not the Macomber-Savidge Lumber Company would put its claim in the Board of Trade, speaking of just before the notes were signed, or at the time.
>
> Mr. Van Duyn. I object to any conversation immediately before the notes were signed, or at the time, on the ground that there would be an attempt to vary a written agreement by parol evidence, contrary to the statute of frauds, in trying to show security, and contrary to Section 713 of the Statutes of the State of Oregon.

COURT. We will consider that question when the evidence is in.

MR. VEAZIE. We don't want to vary a written contract; only showing the circumstances and what was preliminary to it; the groundwork upon which this is based, as to whether there was anything of the kind.

MR. VAN DUYN. Will the Court allow us an exception?

COURT. Certainly."

And the Court erred in requiring plaintiff to testify and admitting, over the above objection, evidence of oral conversation had between plaintiff and defendant prior to the execution of Plaintiff's Exhibits 1 to 10 inclusive, which conversations were in substance and effect that defendant wanted plaintiff to consent to the Macomber-Savidge Lumber Company putting its claim into the Board of Trade with other creditors; that plaintiff did not consent to said claim being filed with the San Francisco Board of Trade until after the defendant had handed him the said notes and exhibits; that said consent was only for himself; that the Crittenden agreement (Plaintiff's Exhibit 11) says the stockholders shall act for themselves; that plaintiff never told Sanborn, the trustee of the Macomber-Savidge Lumber Company, what to do in filing said claim; that said Sanborn was trustee when the notes were executed; that plaintiff told Sanborn to file the said claim as far as he (plaintiff) was personally concerned; that plaintiff understood at the time the said notes, Plaintiff's Exhibits 1 to 10, were executed, that said claim aforesaid was to be filed with the Board of Trade; that the second mortgage to

secure said claim was not talked of between defendant and plaintiff prior to the execution of said notes, Plaintiff's Exhibits 1 to 10; that Goldthwaite said in said conversation that there were negotiations with Menefee, and that he wanted to get matters in shape; that defendant stated to plaintiff in said conversation that he desired to have the claim of Macomber-Savidge Lumber Company reduced so it would not run above a prescribed maximum; that defendant in said conversation said that he had made a statement to the Board of Trade that he didn't owe his creditors to exceed $180,000.00; that Macomber-Savidge Lumber Company's claim against the Modoc Lumber Company would run the indebtedness above that sum; that said claim had to be cut down; that plaintiff at defendant's request gave his personal consent to the trustee for the Modoc Lumber Company to reduce its claim against the Modoc Lumber Company so as to fall within the $180,000.00 limit.

And the Court erred in taking said evidence into consideration in its opinion and findings, conclusions of law, and judgment, as evidence showing and tending to show that the notes sued on were collateral security.

II.

The Court erred in refusing to sustain and in overruling plaintiff's objection to defendant J. O. Goldthwaite testifying in answer to the following questions propounded to him by counsel for defendant, to wit:

> "Q. At the time of the meeting when you agreed to approve the account on behalf of your

company, was Mr. Macomber making any question as to whether he represented his company or himself personally?

Mr. VAN DUYN. We object as incompetent, irrelevant and immaterial, and parol testimony tending to vary an agreement which was reduced to writing.

COURT. It will be admitted, subject to that objection.

Mr. VAN DUYN. May we have exceptions to questions of like kind; as I understand, the same ruling and exception.

COURT. Yes."

And the Court erred, over said objection, in permitting defendant to testify in substance and effect that there was no such question as to whom plaintiff represented at the meeting at which defendant executed his said notes to plaintiff; that Defendant's Exhibit "E" was considered at that meeting; that plaintiff agreed to reduce said claim and file it with the Board of Trade; that defendant told plaintiff about February 28, 1922, about his desire to give a first mortgage and to fund the indebtedness to his other creditors; that defendant then told plaintiff that Menefee and Jones, proposed lenders, would not lend the money to him if there was to be a second mortgage above the sum of $175,000.00, and that it was necessary to reduce creditors' claims to that sum, and it was necessary to reduce the Macomber-Savidge Lumber Company's claim to fall within said amount; that Plaintiff's Exhibits 1 to 10 inclusive, and Defendant's Exhibit "B" were executed at a later date than shown by said exhibits.

And the Court erred in taking said evidence into consideration in its opinion and findings, conclusions of law and judgment, as evidence showing and tending to show that the notes sued on were collateral security.

III.

The Court erred in refusing to sustain, and in overruling plaintiff's objection to defendant J. O. Goldthwaite testifying in answer to the following questions propounded to him by counsel for defendant, and permitting defendant to make the following answers, to wit:

"Q. Did you have any discussion with Mr. Macomber as to the note?

A. Yes, I protested at the time that the account at the time was the Modoc Lumber Company account of indebtedness to Macomber-Savidge Lumber Company.

Mr. Van Duyn. This is understood to be all subject to the same objection.

Court. All the evidence which may tend to vary the contract is under your objection, yes.

Mr. Veazie. We don't want to vary it ourselves; we want to show the setting of it.

Court. I think I understand what you are trying to show, yes.

Q. You may continue your answer. You say that you protested that the indebtedness was between the two corporations?

A. Yes, I told him at the time that the notes logically should run to the Macomber-Savidge Lumber Company. At that time the Macomber-Savidge Lumber Company had no evidence of the debt outside of an open book account, and Mr. Macomber explained that to me first—emphasized that, I mean. Secondly, he outlined to me again as he had on a number of occasions past, the fact that he was having a great deal of trouble with

his other partners in the Macomber Savidge Company; that he had had trouble with his first assignee, Crittenden; that he didn't know how the new assignee, Sanborn, was going to act, and that he desired if possible to have these notes in his own name, in case any trouble arose in the future, where he would have the whiphand, or dominate the situation within his own company. He went into some extensive length in impressing me with that situation.

Q. Did you at that time owe Mr. Macomber personally any money?

A. Not at that time or any other time, no, sir.

Q. He never loaned you any money?

A. No, sir."

And the Court erred in taking said evidence into consideration in its opinion, findings, conclusions and judgment, as evidence showing or tending to show that the notes sued on were collateral security.

IV.

The Court erred in refusing to sustain, and in overruling plaintiff's objection to defendant J. O. Goldthwaite testifying, in answer to the following questions propounded to him by counsel for defendant, and permitting defendant to make the following answers, to wit:

"Q. Was there any other consideration given to you for the execution of these notes that you have set forth in your answer?

Mr. Van Duyn. No failure of consideration pleaded.

Mr. Veazie. We pleaded exactly what the consideration was, and I simply asked him if there was any other consideration.

A. None whatever, no, sir.

Mr. VAN DUYN. Objected to upon the ground that it has not been pleaded in the answer or further defense of the defendant, and varies the contract.

COURT. Admitted, subject to that objection and exception.

Q. Under these circumstances you then signed the notes which are in evidence?

A. Yes."

And the Court erred in taking said evidence into consideration in its opinion, findings, conclusions and judgment, as evidence showing or tending to show that the notes sued on were collateral security.

V.

The Court erred in permitting J. O. Goldthwaite, the defendant, a witness on his own behalf, over the objection of counsel for plaintiff that such testimony would tend to vary the notes sued upon, to testify in attempted support of the further and separate defense set forth in the amended answer, in substance that there was no personal consideration between plaintiff and defendant for the notes sued upon; that the said notes were made payable to plaintiff over defendant's protest; that plaintiff insisted that said notes be made payable to plaintiff; that said notes were made at another date than the date of execution set forth therein; that proceedings were had before the Creditors' Committee of the San Francisco Board of Trade that resulted in the claim of Macomber-Savidge Lumber Company being, with other claims being evidenced by a series of notes of the Modoc Lumber Company and the Williamson River Logging Com-

pany; and the alleged sale of said notes and mortgages to the L. B. Menefee Investment Company, and the alleged payment and release of the same.

VI.

The Court erred in permitting J. O. Goldthwaite and G. W. Brainard, witnesses on behalf of the defendant, to testify over the objection of plaintiff, that said testimony was immaterial and that it would tend to vary plaintiff's Exhibits 1 to 10 inclusive, as to the transactions had before the Board of Trade of San Francisco, and as to the payment of the notes and mortgages.

VII.

The Court erred in stating the law of the case as follows:

In the District Court of the United States for the District of Oregon

F. B. Macomber,	Plaintiff,
vs.	
J. O. Goldthwaite,	Defendant.

L. 9664

Portland, Oregon, June 7, 1926.

Memorandum by Bean, District Judge:

This is an action on ten promissory notes executed by the defendant and made payable to the plaintiff, each dated March 1, 1922, and each for five thousand dollars.

The facts are not seriously in controversy. At the time the notes were given the plaintiff was the president and one of the principal stockholders of the Macomber-Savidge Lumber Company, a California corporation, which had been engaged in the business of buying and selling lumber in California and elsewhere, and the defendant was the president and principal stockholder and general manager of the Modoc Lumber Company, which had been engaged in manufacturing lumber for sale.

During the years 1920 and 1921 the Macomber Company had purchased a large quantity of lumber from the Modoc Company, and on account thereof had a claim against it for seventy-one thousand dollars, or thereabouts, some of the items of which, however, were in dispute.

Each of the corporations was in financial trouble. The assets of the Macomber Company were in the hands of a trustee, and the affairs of the Modoc Company were being handled by the San Francisco Board of Trade.

The defendant, as president of the Modoc Company, had arranged for refinancing his company by obtaining a loan of two hundred and fifty thousand dollars, to be secured by first mortgage on its property, but as a condition to making the loan the lender insisted that the claim of its creditors should not exceed a certain amount, and should be assembled and secured by a second mortgage on the property. To consummate this arrangement it was necessary that the claims of the creditors of the Modoc Company be assigned to a

representative of the San Francisco Board of Trade. By the latter part of February, 1922, all such creditors except the Macomber Company had made such assignment. In order to accomplish the refinancing of the corporation and comply with the conditions imposed by the proposed lender of the two hundred and fifty thousand dollars, it was necessary to obtain a reduction of the Macomber Company claim to approximately fifty thousand dollars in amount, and to assign then to the Board of Trade. The defendant thereupon approached the plaintiff to obtain his consent to a reduction of the claim to such an amount, and to the assignment thereof, to a representative of the Board of Trade, so that the refinancing of the Modoc Company could be consummated. After some negotiation the defendant, on behalf of his company, agreed to approve the claim of the Macomber Company as made by it, but plaintiff agreed that, for the purpose of assignment to the Board of Trade, it might be reduced to about $54,000.00, and the defendant executed and delivered to him the promissory notes in suit, for the amount thereof, he agreeing in writing that any and all payments made by the Modoc Company, either direct or through the Board of Trade, should be applied on such notes.

The claim of the Macomber Company for the reduced amount was thereupon assigned to the Board of Trade, or to its representatives, and the refinancing of the Modoc Company accomplished by the execution by it of a first mortgage on its property for $250,000.00, and a second mortgage to secure the

claims of its creditors, including the Macomber Company.

Thereafter, and on May 26, 1922, the Board of Trade advised the Modoc Company in writing that the claims of the various creditors, including that of the Macomber Company, had been fully paid and satisfied in full. The second mortgage was subsequently sold by the Board of Trade for thirty cents on the dollar and the proceeds applied on the various claims in proportion to their respective amounts, and the plaintiff gave credit on the notes in suit for the dividend on the Macomber Company's claim. Later the second mortgage was paid in full by the Modoc Company to the assignee thereof.

The defendant claims that the legal effect of the transaction was to make his notes security or a limited guaranty for the reduced claim of the Macomber Company, and that they were discharged or released when the mortgage of the Modoc Company securing the same was paid and satisfied in full. While the plaintiff's position is that the notes were a personal matter between himself and the defendant, unaffected by any transactions in which their respective companies were concerned, other than this personal agreement that any payments made by the Modoc Company either directly or through the Board of Trade, should be credited on the notes.

Without discussing the question at length, I am disposed to accept the defendant's version of the transaction. The plaintiff and the defendant were each assuming to act for and on behalf of his respective

corporation. There was no unsettled differences between them personally. The only debt existing at the time the notes were given, and about which they were dealing, was the debt of the Modoc Company to the Macomber Company. The plaintiff personally made no demands on the defendant, nor did the latter owe him anything. The notes were not given on account of any personal obligation of the defendant to the plaintiff, but because of the account due the Macomber Company from the Modoc Company. They were made for the benefit of the Modoc Company. The legal effect was to make them as security or guaranty of its debt, and when the mortgage securing the same was paid, the obligation of the maker of the notes was satisfied.

The admission of parol evidence to show the true relationship of the parties and the nature and character of the transaction, did not alter or vary the terms of the original contract, nor affect its integrity. It was merely proof of an independent collateral fact which affected the rights of the parties thereto by showing that the notes were in fact security for the debt or liability of another, and not as a personal obligation to the plaintiff. (Hoffman v. Habighorst, 38 Or. 361; 49 Or. 379; Silva v. Gordo 224 Pac. 757; Norton v. Tucson Cattle Co., 236 Pac. 1110; Ledford v. Huggans, 214 Pac. 686; Clark v. Duchmean, 72 Pac. 331.)

Findings and judgment may be entered accordingly.

VIII.

The Court erred in paragraph VI of its findings of fact on file herein, in making the following finding:

> "To obtain said concession, the Modoc Lumber Company and the defendant on the one part, agreed with the Macomber-Savidge Lumber Company and the plaintiff herein, on the other part, that the Macomber-Savidge Lumber Company, through its trustee, should present and assign its claim to the Board of Trade of San Francisco for inclusion in the second mortgage or other form of funded indebtedness, in the amount of only $53,905.92, and that in consideration thereof the Modoc Lumber Company should approve the claim of the Macomber-Savidge Lumber Company, as stated by it, in the amount of $68,164.83, and in addition thereto that the defendant should guarantee the payment of part of the said claim, to-wit: to the amount of $50,000.00, by giving the promissory notes described in the complaint, and hereinafter mentioned, on the understanding that the said portion thereof turned over to the Board of Trade of San Francisco should be converted into notes or other evidence of indebtedness signed by the Modoc Lumber Company and the Williamson River Logging Company, and secured by a second mortgage or some form of lien on the properties above mentioned, and that any and all payments made on any part of said indebtedness of the Modoc Lumber Company to the Macomber-Savidge Lumber Company, whether on the part thereof so turned over to, or handled through the Board of Trade of San Francisco, or the balance thereof not so turned over or assigned, should be credited against the said personal notes to be given by the defendant herein as a guaranty, up to the amount of defendant's said notes."

In that there is no evidence of any kind in the record to support such opinion, but on the contrary the

evidence adequately shows without contradiction, uncertainty or conflict, that there was no agreement made between plaintiff and defendant that the defendant should guarantee $50,000.00 or any other sum, or at all, of the claims of Macomber-Savidge Lumber Company, by giving the notes sued on herein.

IX.

The Court erred in paragraph VII of its findings of fact on file herein, in making the following finding:

> "The said ten promissory notes described in the Amended Complaint were each and all made, given and delivered by the defendant, and taken, accepted and received by the plaintiff, for the use and benefit of, and as agent for, the Macomber-Savidge Lumber Company, solely on the considerations aforesaid, and on the agreement and understanding between the parties to said notes, had and entered into at the same time the notes were given, that the defendant should thereby become bound as surety and guarantor for the Modoc Lumber Company, up to the amount of $50,000.00 for the payment of said indebtedness then existing and owing from the last named company to the Macomber-Savidge Lumber Company, as hereinbefore set forth, and not otherwise."

In that there is no evidence of any kind in the record to support such finding or any part thereof.

X.

The Court erred in paragraph XV of its findings of fact on file herein, in making the following finding:

> "By the making of the payments aforesaid there has been paid on account of the said orig-

inal indebtedness of the Modoc Lumber Company to the Macomber-Savidge Lumber Company existing and unpaid on the first day of March, 1922, to which the notes of the defendant sued on herein were a collateral security and stood as a limited guaranty, an amount in excess of the said guaranty, and said guaranty has thereby been fully exonerated. Furthermore, the mortgaged properties which were released from the lien of said mortgage far exceeded in value the first and second mortgages against the same, and by the release of the said mortgage security, the defendant has been released from liability on said guaranty covered by the notes sued on herein."

In that there is no evidence whatever in the record that said defendant's notes sued on herein were collateral security, or stood as a limited guaranty and/or that any payment has been made upon the notes sued on, except as in the amended complaint set forth, and/or that none of said notes have been discharged.

XI.

The Court erred in failing to make findings on all the material issues of this cause, to wit, in failing and omitting to find that the Macomber-Savidge Lumber Company made an assignment on December 14, 1921, of all its assets, including the claim against the Modoc Lumber Company, and that by said assignment the plaintiff herein was deprived of all power to represent his company, and had thereafter no power in relation thereto, except to give individual consent to acts of trustee, as is more particularly set out in paragraph V of the amended reply, and as evidenced by Plaintiff's Exhibit 11, the Crittenden agreement.

XII.

The Court erred in making the following conclusions of law:

I.

The foregoing facts and circumstances as covered by the Findings of Fact made herein, were such as to constitute the defendant nothing more than a limited guarantor of the payment of the debt of his company, the Modoc Lumber Company, to the Macomber-Savidge Lumber Company, up to the amount of the notes set forth in the Amended Complaint; said guaranty to be fully discharged whenever an amount equal to the total of the notes should be paid on the principal debt to which said guaranty was collateral.

II.

Said guaranty was fully discharged and the defendant was exonerated from further liability thereon when the second mortgage notes of the Modoc Lumber Company were paid and discharged, as set forth in the above Findings.

III.

Defendant is entitled to have judgment herein that the plaintiff have and recover nothing on the promissory notes set forth in the Amended Complaint; that said action be dismissed; and that defendant have and recover of and from the plaintiff the defendant's costs and disbursements.

In that said conclusions are based upon no evidence and are not justified by the findings.

XIII.

The Court erred in giving judgment against the plaintiff and in favor of the defendant, on the ground that the notes of defendant sued on by plaintiff herein were collateral security to the claim of the Macomber-

Savidge Lumber Company, and the claim having been paid, the notes were discharged; in that the evidence shows without dispute or contradiction, that the only written contracts between the parties were the notes themselves and a written personal agreement between plaintiff and defendant identified in the evidence as Defendant's Exhibit "B", which exhibit states no contract of suretyship; the only evidence antedating the execution of said notes and pertaining to the reasons why the same were given, was the evidence of J. O. Goldthwaite in which he relates an oral conversation had with plaintiff, in no part of which was mention made of suretyship, and defendant's testimony under cross-examination that no conversation was had between plaintiff and defendant concerning the notes sued on herein;

The Court erred in admitting in evidence and in taking into consideration, in giving its opinion and rendering its findings of fact and conclusions of law and judgment, said oral conversation, and in considering any other evidence than Plaintiff's Exhibits 1 to 10 inclusive, and Defendant's Exhibit "B".

ARGUMENT.

POINT I.

ASSIGNMENTS OF ERROR I TO VI INCLUSIVE.

(Trans. pp. 80 to 88.)

The notes sued upon were plain and unambiguous promises to pay, needing no oral explanations. The notes in themselves acknowledged the consideration by stating therein that there was "value received". The answer of defendant (Trans. pp. 22 to 39)

pleaded no illegal, partial or entire failure of consideration, and admitted the *making, execution and delivery* of the notes. Defendant's only defense was that said notes were guaranty and surety notes only to the amount of the Macomber-Savidge Lumber Company claim against the Modoc Lumber Company, and that said alleged notes of guaranty were released because the said claim of the Modoc Lumber Company was paid. To the end of making proof under this defense, defendant sought to make oral proof both through cross-examination of plaintiff, Macomber, and direct examination of defendant Goldthwaite. To this, plaintiff objected (Trans. p. 81) on two principal grounds, to wit:

1. That a written agreement cannot be varied by parol testimony.

2. That parol testimony, under the Statute of Frauds, is inadmissible to prove a guaranty. The objections were reiterated in each of the assignments of error named in this subdivision (Point I).

In view of the law of Negotiable Instruments as adopted by the legislature of the State of California, to wit, Sec. 3105, Civil Code of California, in which State the notes herein in question were executed and delivered and under which they are to be interpreted, that:

> "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; every person whose signature appears thereon to have become a party thereto for value"

and in view of the fact that defendant had not pleaded absence or failure of consideration as re-

quired by section 3109 of the *Civil Code of California,* which reads as follows:

> "That absence or failure of consideration is a matter of defense as against any person not a holder in due course."

And in view of the following authorities, defendant, having failed to allege an absence or failure of consideration, is not entitled to enter by parol into the matter of consideration in a contract, for the purpose of showing that the consideration or the contract is a different one than that set out in the notes.

The Code States require a want of consideration or illegality of consideration to be specially pleaded.

In 8 *Corpus Juris, Bills and Notes,* p. 965, Sec. 1265, the rule is laid down as follows:

> "At common law, failure, illegality, or want of consideration may be shown under the general issue; and it has been held that a plea in bar alleging a want of consideration is bad on demurrer as amounting to the general issue. On the other hand, the general rule, independent of statute, is that a partial failure of consideration cannot be shown under the general issue. In the code states, however, where affirmative defenses are required to be specially pleaded, and by statute or rule of court in some of the other states, it is now the general rule that all of such defenses must be specially pleaded, in order to be available, and that evidence thereof is not admissible under a general denial."

Section 73, Vol. 1 *Lord's Oregon Laws,* provides as follows:

> "The answer of the defendant shall contain,—
>
> 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; provided, how-

ever, that nothing can be proved under a general denial that could not be proved under a specific denial of the same allegation or allegations.

2. A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition."

The Oregon Courts hold that the Oregon Code has substituted for the general issue at common law an answer which must contain a specific denial of the material allegations intended to be controverted: *Coos Bay R. R. Co. v. Siglin,* 26 Or. 390, 38 Pac. 192, that under a denial, the defendant should be permitted to show no fact that does not go directly to disprove the fact denied. If he merely denies the facts alleged by his answer, he can only offer in evidence such facts as go to disprove the plaintiff's cause of action, and if he intends to rest his defense on any fact that does not tend to disprove the plaintiff's cause, such fact is new matter, and must be pleaded: *Buchtel v. Evans,* 21 Or. 312, 28 Pac. 67; that the object of the answer is to *notify the court and the opposite party* of the facts relied on as a defense *so plainly* that the plaintiff may be prepared to meet them. A pleading would be entirely defeated if a plaintiff had a right to aver in his complaint one ground of action and on the trial prove another and different one: *Troy Laundry Co. v. Henry,* 23 Or. 237, 31 Pac. 484; *Knahtla v. O. S. L. R. Co.,* 21 Or. 137, 27 Pac. 91."

The California Code provision in regard to new matter in the answer is almost word for word like the Oregon Code.

The following California cases uphold the doctrine stated above:

Pastene v. Pardini, 135 Calif. 431, 67 Pac. 681;
Sharon v. Sharon, 68 Calif. 29, 8 Pac. 614;
Winters v. Rush, 34 Calif. 136.

And in view of the law of evidence as to varying a written contract by parol evidence and proving guarantees upon oral testimony hereinafter set out, we contend that the Court was in error in admitting the oral conversations which were received in evidence.

Parol Evidence Not Admissible to Vary Written Instrument.

> "Where parties have entered into a contract or agreement which has been reduced to a writing, it is a general rule that in the absence of fraud or mistake, if the writing is complete upon its face and unambiguous, parol evidence is not admissible to contradict, vary, alter, add to or detract from the terms of the instrument."

Ency. of Evidence, Vol. 9, Parol Evidence, p. 321.

> "Where parties have reduced their obligations or agreements to a writing which is upon its face couched in such terms as to import a complete legal obligation with no uncertainty as to the nature, character, object and extent of their agreement, all prior negotiations and agreements are regarded as merged therein, and the conclusive presumption arises that the whole engagement of the parties is expressed in the writing. This, the common-law rule, was intended to guard against fraud and injustice by not permitting parties to deny their solemn written agreements, or overthrow them by the uncertain words and memories of unreliable witnesses."

Idem, p. 325.

> "Although this rule is in many cases spoken of as a rule of evidence, yet it is declared in a recent case that according to the modern and better view the rule is one of substantive law and not of evidence, parol proof being excluded not because it is lacking in evidentiary value, but because the law for some substantive reason declares that what is sought to be proved by it

(being outside the writing by which the parties have undertaken to be bound), shall not be shown. And this latter view has the support of the modern text writers upon the subject."

Idem, p. 326.

"Where a written instrument is valid, clear and unambiguous upon its face, and purports to contain the complete agreement of the parties, parol evidence is not admissible to show that the actual or secret intent of the parties thereto was other than is expressed in the writing, as in such a case the terms of the instrument alone must be looked to to ascertain the intention."

Idem, p. 329.

"The general rule applies to conversations and negotiations prior to or in connection with the execution of a writing, as in such cases all negotiations and conversations are presumed to be merged in the writing.

It is a general rule that evidence of a prior or contemporaneous agreement which is inconsistent with the terms of a written instrument, complete upon its face, and unambiguous, is, in the absence of fraud or mistake, inadmissible to contradict, vary or in any way alter the terms of the written instrument, as all such agreements are presumed to be merged in the writing, or if not embraced therein, to have been rejected by the parties.

"The rule excluding parol evidence is applicable not only to the terms of the instrument, but also excludes such evidence where it will operate to contradict or vary the legal effect thereof. If the instrument as executed by the parties is clear and unambiguous in its meaning, and has a well-settled legal construction or effect, such construction or effect will control and is not subject to contradiction by parol evidence, in the absence of fraud, accident or mistake."

Idem, pp. 330 to 334.

"It is a well established rule of the common law, which has been embodied in statutes in a number of states, that when any judgment of any court, or any other judicial or official proceeding, or any agent or other disposition of property, or any contract, agreement, or undertaking has been reduced to writing, and is evidenced by a document or series of documents, the contents of such documents cannot be contradicted, altered, added to, or varied by parol or extrinsic evidence.

"Reason for rule. It has been said that the rule is founded on the long experience that written evidence is so much more certain and accurate than that which rests in fleeting memory only, that it would be unsafe, when parties have expressed the terms of their contract in writing, to admit weaker evidence to control and vary the stronger and to show that the parties intended a different contract from that expressed in the writing signed by them. And if the uncertainty of 'slippery memory' furnished a ground for excluding such verbal testimony, as declared in the days of Lord Coke, certainly the modern practice, admitting as witnesses the parties directly interested, makes a strict adherence to the rule still more urgent in these days.

"The rule is a necessary one because of the obvious fact that written instruments would soon come to be of little value if their explicit provisions could be varied, controlled, or superseded by parol evidence, and it is also plain that a different rule would greatly increase the temptations as to commit perjury: and courts have expressed regret that in their anxiety to avoid possible injustice in particular cases, they have been gradually construing away a principle which has always been considered one of the greatest barriers against fraud and perjury."

"Rule of substantive law or of evidence. It has been asserted that the rule under discussion

is one of evidence merely, and does not depend upon the doctrine of estoppel at law, or upon the statute of frauds, although it rests on substantially the same principle. But according to the modern and better view the rule which prohibits the modification of a written contract by parol is a rule, not of evidence merely, but of substantive law. As the question is not one of practical importance it is not deemed necessary to refer to the numerous cases in which one or the other view has been expressed."

22 *C. J.* Sec. 1380, p. 1070.

"The legal effect of a written instrument, even though not apparent from the terms of the instrument itself, but left to be implied by law, can no more be contradicted, explained, or controlled by parol or extrinsic evidence than if such effect had been expressed, especially if persons who were not present at its execution have acted on the instrument as legally construed."

Idem, Sec. 1381, p. 1075.

"Although the authorities as to the admissibility of parol evidence to affect commercial paper are by no means uniform, the general rule is that bills, notes, and other instruments of a similar nature are not subject to be varied or contradicted by parol or extrinsic evidence."

22 *C. J.,* Sec. 1443, p. 1089.

"It is not permissible to show a parol agreement of the payee or holder of commercial paper not to enforce payment against the person or persons liable thereon; or a parol agreement that the payee or holder shall look to some other person or persons for payment, that he shall require payment only in a certain event or out of some particular fund, that he shall not require payment until a certain security has been exhausted, that he shall not call on one of the persons liable for payment until all remedies against

the others have been exhausted, or that the obligation may be extinguished by part payment."

22 *C. J.*, Sec. 1445, p. 1091.

"A statute which allows a party to call his adversary as a witness furnishes no ground for establishing an exception to the parol evidence rule, for if the matter could thus be opened up, other witnesses might be called, and all the consequences which the rule is designed to prevent might follow."

22 *C. J.*, Sec. 1530, p. 1144.

"Where a bill or note or other negotiable instrument is absolute in its terms, neither the maker nor the indorser can be allowed to show that the obligation was a conditional one merely or was to be paid only in a certain contingency, and this is true notwithstanding the fact that the note was given pursuant to a verbal agreement for the payment of a sum of money on a certain contingency, for the condition must be held to have been waived by the giving of an unconditional note. But it may be shown, as between the parties or others having notice, that the *delivery* was conditional only and that the instrument never in fact *came into force* as a binding obligation."

22 *C. J.*, Sec. 1542, p. 1152.

"Where the language used is clear and unambiguous, extrinsic evidence is not admissible on the ground of aiding the construction, for in such case the only thing which could be accomplished would be to show the meaning of the writing to be other than what its terms express, and the instrument cannot be varied or contradicted under the guise of explanation or construction. Nor can any evidence of the language employed by the parties in making the contract be resorted to except that which is furnished by the writing itself. It is also well established

that parol evidence is not admissible to give to a writing a construction conformable to the secret intentions which one or both of the parties may have entertained but which the writing fails to express."

22 *C. J.*, Sec. 1570, p. 1177.

"The parol evidence which can be admitted to explain the contract must be such as tends to show the correct interpretation of the language used, and its only purpose is to enable the court or jury to understand what the language really means; evidence which has no tendency to aid in the construction of the writing or to explain any ambiguity therein cannot be received. It is therefore necessary that the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument should be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument, not of what was intended to be written."

22 *C. J.*, Sec. 1571, p. 1179.

For further authorities on the above subject, see the

"Modern Law of Evidence," Chamberlayne, Sec. 3548;

Bryan v. Idaho Quartz Mining Co., 73 Cal. 249, 14 Pac. 859;

Smith v. Baer, 46 Ore. 143, 79 Pac. 497, 114 A. S. R. 858;

Swift v. Occidental L. & P. Co., 141 Cal. 161; 74 Pac. 700;

Williams v. Mt. Hood Ry. & Power Co., 57 Ore. 251, Ann. Cases 1913-A 177;

Ruckman v. Imbler Lbr. Co., 42 Ore. 231;

Colvin v. Goff, 82 Ore. 314, L. R. A. 1917 C, 300, 161 Pac. 568;

Jones on "Evidence", Vol. 3, Sec. 494;
Dollar v. International Corporation, 13 Cal. App. 331, 109 Pac. 499.

In an action on a promissory note, it cannot be shown by parol that the note was intended merely as a memorandum and was to be paid only on a contingency.

Wilson v. Wilson, 26 Ore. 251 (by Judge Wolverton).

In *Nickell v. Bradshaw,* (Oregon) 183 Pac. 13, decided July 29, 1919, by Judge Harris, the Court, on page 19 says:

> "In the last analysis the contention of the respondent is only an effort to vary and contradict the written contract of endorsement, and hence the parol testimony relating to any contemporaneous oral agreement was incompetent."

The rule inhibiting parol evidence to vary a writing applies particularly to negotiable paper.

Smith v. Caro & Boune, 9 Ore. 278.

Varying Parties to Instrument.

> "By engaging to pay a particular person, the maker acknowledges his capacity to receive the money and his capacity to order it paid to another."

Sec. 5893, *Lord's Oregon Laws.*

> "It has been held that parol evidence will not be admitted to show that the real parties to an instrument are other than those whose names appear in or are signed thereto."

Gill v. General Electric Co., 129 Fed. 349;
Ferguson v. McBean, 91 Cal. 63.

Sec. 713, *Lord's Oregon Laws,* provides as follows:

> Parol Evidence—Oregon Statute, Sec. 713, Oregon Laws: "EVIDENCE OF TERMS OF AGREEMENT REDUCED TO WRITING. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore, there can be between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:
>
> 1. Where a mistake or imperfection of the writing is *put in issue by the pleadings:*
>
> 2. Where the *validity* of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 717, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term 'agreement' includes deeds and wills as well as contracts between parties."

Section 714 of *Lord's Oregon Laws,* provides as follows:

> "INTERPRETATION, BY LAW OF PLACE OF EXECUTION. The language of a writing is to be interpreted according to the meaning it bears in the place of its execution, unless the parties have reference to a different place."

Section 1625, *Civil Code of California,* provides as follows:

> "EFFECT OF WRITTEN CONTRACTS. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. (Amendment approved 1905; Stats. 1905, p. 611.)

Section 1647, *Civil Code of California,* provides as follows:

> "CONTRACTS EXPLAINED BY CIRCUMSTANCES. A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

This section, to wit, 1647, does not modify the parol evidence rule. It is invoked only in cases where upon the face of the contract itself there is a doubt, and the evidence is used to dispel that doubt.

> *United Iron Works v. Outer H. etc. Co.,* 168 Calif. 81, 141 Pac. 917.

In the above entitled case, the Court well defined the rule, when it said:

> "The evidence (parol) is used to dispel that, not by showing that the particular parties meant something *other than* what they said, but by showing what they meant *by* what they said."

There is a great deal of difference between the admissibility of extrinsic evidence to *explain* that which is written and the admissibility of extrinsic evdence to *contradict* that which is written.

The Oregon statute set forth above, to wit, Sec. 713, is practically in the same language as Sec. 1647 of the California Civil Code, and should be interpreted in the same way.

Both statutes are but restatements of the common law.

There was no ambiguity in the ten notes introduced by plaintiff herein, and it was error to admit evidence of surrounding circumstances.

> *Abraham v. Oregon & C. R. Co.,* 37 Ore. 495;

82 *A. S. R.* 779, 64 L. R. A. 391, 60 Pac. 899;
Dunlap v. Lewis, 64 Ore. 482, 130 Pac. 973;
McConnell v. Gordon Const. Co., 105 Wash. 659, 178 P. 823;
Meyer v. Everett Pulp etc. Co., 193 Fed. 857, 113 C. C. A. 643 (9th Circuit).

In the above case, the Court approved the rule, which was stated in *Davis Calyx Drill Co. v. Mallory,* 137 Fed. 332, 69 L. R. A. 973, as follows:

> "Where the written contract of the parties is complete in itself, the conclusive legal presumption is that it embodies the entire engagement of the parties and the manner and extent of their obligations, so that parol evidence of other terms is inadmissible to extend, modify, or contradict it."

A Parol Agreement to Answer for the Default of Another Is Void.

All evidence brought by defendant to contradict the absolute promise of the notes, is oral,—and being oral is void.

Section 1624, *Civil Code of California,* provides as follows:

> "* * * 2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section twenty-seven hundred and ninety-four;"

Section 808, *Lord's Oregon Laws,* provides as follows:

> 1. "In the following cases the agreement is *void* unless the same or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged, or by his lawfully authorized agent;

evidence, therefore, of the agreement shall not be received other than the writing or secondary evidence of its contents in the cases prescribed by law.

2. An agreement to answer for the debt, default, or miscarriage of another."

See, in support of the above, the following authorities:

Miller v. Lynch, 17 Ore. p. 61, 19 p. 845;
Gump v. Holberstadt, 15 Ore. p. 358, 15 p. 467;
Stearns on Suretyship, Sec. 35, p. 45, and
Jones on Evidence, Proof of Guaranty, Vol. 3, Sec. 427,

holding that all contracts of suretyship are within the statute of frauds.

Since the above Section 808 of the Oregon Laws provides that a contract to answer for the debt or default of another must be in writing, and that if it is not, the contract is *null and void,* it follows that if in the case at bar there was in fact any oral evidence, by which Goldthwaite had agreed to answer for the debt of Modoc Lumber Company, such contract would have been null and void. The plaintiff in this case could not have recovered on an oral contract of suretyship against the defendant, and conversely the defendant cannot use it as a defense, or prove a guaranty. Such contract in any event would be null and void and would be useless to either party. So, in addition to the fact there is no oral evidence in this case that the notes were suretyship notes, we have the further rule of law that suretyship of the notes cannot be proven by parol testimony.

POINT II.

ASSIGNMENT OF ERROR VII.

(Trans. p. 89.)

In addition to our contention that parol evidence was not admissible to contradict the absolute promise to pay the notes described as Plaintiff's Exhibits 1 to 10 inclusive, we further contend that the Court erred in considering the said parol evidence, and in making it the basis of a finding which is in conflict with, and varies the notes sued upon.

In *Dollar v. International Banking Corporation,* (Cal.) 109 Pac. on page 504, the Court said:

> "* * * but parol evidence would neither be admissible to vary this contract, nor, if admitted without objection, be sufficient to support a finding which was in conflict with or which in any manner varied the original contract which the parties entered into."

In its decision, the Court states that there was no debt owing Macomber from Goldthwaite, and therefore, there was no consideration for the notes. (Trans. p. 92.) We contend that the Court erred in this matter of consideration,—as the consideration that Goldthwaite received from Macomber was injury to his stockholder's interest in the Macomber-Savidge Lumber Company through—

(1) Postponing the due date of Modoc Lumber Company's account to the Macomber-Savidge Lumber Company.

(2) Allowing Menefee's indebtedness to be a preferred lien over the claim of the Macomber-Savidge Lumber Company filed with the Board of Trade.

(3) By allowing the other creditors to share in the lien of the second mortgage of the Board of Trade.

(4) By allowing the balance of $18,000.00 still due the Macomber-Savidge Lumber Company after dividing and filing its claim, to wit, $18,000.00 to be postponed as to security and sharing in the assets of the Modoc Lumber Company.

(5) By preserving to defendant this equity in the assets of the Modoc Lumber Company, resulting in the end in Goldthwaite realizing the sum of about $196,000.00,—which would have been entirely lost to him had he not obtained the consent of Macomber to the trustee filing the claim of the Macomber-Savidge Lumber Company. Through this consent Mr. Macomber sustained great individual loss to his stock interests, and Mr. Goldthwaite received great individual benefits.

The above constituted a fair and full consideration for the $50,000.00 in notes, which had the most remote chance of ever being realized upon at the time they were executed.

POINT III.

ASSIGNMENTS OF ERRORS VIII TO X INCLUSIVE.

(Trans. pp. 93 to 95 inc.)

The above assignments cover the question as to whether the testimony in the case shows any evidence of suretyship, and will be discussed together as one point.

The principal contention of defendant is that the Goldthwaite notes are collateral surety or guaranty notes and that they have been satisfied by what defendant contends is the payment of what he terms the primary obligation, meaning the $53,905.92 claim of

the Macomber-Savidge Lumber Company. We contend, on the contrary, that the Goldthwaite notes of $50,000.00 themselves are the principal obligation. The notes themselves are, of course, absolute promises to pay, and are in no way conditional upon the payment of a claimed principal obligation, but are themselves the principal obligation. This being the case, it is necessary for defendant to show by something outside of the notes themselves, that said notes were surety notes. Outside of the notes, there are only two factors to be considered, to wit, the oral conversation between plaintiff and defendant at or immediately prior to the time of the execution of the notes, and defendant's Exhibit B (Trans. p. 113), to wit, the personal agreement between plaintiff and defendant.

There is not a word in all of the evidence of such an oral conversation or agreement as to suretyship. On the contrary, the testimony of *Goldthwaite himself* is that the notes that he gave to Macomber *were not discussed at all.* In reply to a question of the Court on cross-examination, the following testimony was given by Goldthwaite:

> "COURT. Q. Why were these notes made for $5,000.00 each, and distributed over the length of time for payment?
>
> A. Yes.
>
> Q. I say, why was that done?
>
> A. I don't know—that was Macomber's notion. *We never discussed those notes at all.* He just presented them to me." (Trans. bottom of page 225 and page 226.)

It follows, therefore, from the foregoing statement of defendant that the notes *were not discussed* and

that the notes cannot be construed with any *oral* testimony to show a guaranty, for there is no such testimony. If the notes were not discussed, guarantyship or suretyship were certainly not mentioned.

During the course of Macomber's redirect examination, he testified that Goldthwaite knew he was not taking the notes for the company (Trans. page 135), and in response to the following question the following statements were made by counsel:

> "Q. Have you had any letters from him in regard——
>
> Mr. VEAZIE. May it please the Court, as far as that point is concerned there, I think we ought to object to it, as far as it attempts to vary *that writing, because that writing shows the basis on which taken.*
>
> Mr. VAN DUYN. That is what we claim. If you want to stand on the writing we will both stand on it.
>
> Mr. VEAZIE. We will stand on the writing as far as it states the facts." (Trans. pages 135-136.)

This shows how counsel met on the question of varying the contract.

Is There Any Statement in the Instrument of February 28, 1922, That Shows Goldthwaite Notes Were Conditional Guarantees?

The question of parol evidence showing that the Goldthwaite notes were guarantees, having been disposed of, we have then only the question of whether there is anything in the written instrument of February 28, 1922, that shows the notes were guarantees.

We can find no statement therein that they were guarantees. The word "guarantee" or "suretyship" is not used. The substantial provision, so far as the

notes sued upon, is as to how credits shall be given upon the notes. What payments were to be applied upon the notes was the purpose and subject of the agreement. Had Goldthwaite intended these notes to be guarantees, it would have been easy to have said so in the personal agreement. Even a man of no experience, and of little education could have made clear that the notes were intended to be guarantees. That payments coming through the San Francisco Board of Trade, or through the Modoc Lumber Company, were to be credited on the notes does not constitute a guarantee. By agreement, a credit on payment, coming through any one, could have been credited. Such an agreement would constitute no guarantee. Goldthwaite evidently considered himself and the company as being practically one. It made no difference to him whether the company paid the notes, or whether he paid them himself. What money he got came from the company, and he would just as soon have the company pay for him as to have the company pay him, and then he to pay Macomber.

Had Goldthwaite, the maker of the notes, and Macomber, the payee of the notes, intended to make Goldthwaite a surety to the $53,905.92 claim filed with the San Francisco Board of Trade, they both being business men of experience, would either have expressly stated in the personal agreement that the notes were only guarantee notes or *else they would have had the Modoc Lumber Company make its notes payable to Sanborn, trustee of the Macomber-Savidge Lumber Company, and Goldthwaite would have endorsed the notes on the back as a surety.* Certainly

no person of intelligence would have undertaken by a devious, intricate and uncertain method, as is attempted by defendant, to be asserted here to formulate a guarantee. Only a person endeavoring to escape a liability, and looking for a hole to crawl through could read into the personal written agreement anything in the nature of a guaranty.

Defendant claims the notes were sureties to the Board of Trade's notes $53,905.92. Why then did not Goldthwaite on February 28 and March 1, 1922, make his notes payable at the same time and in the same amount? Why did he spread the maturity of his notes over a period of thirty odd months? Why make them bear interest? Why place these negotiable instruments in the hands of Macomber, who could have transferred them before maturity, and thus subjected Goldthwaite to pay them without the right of making the defense of suretyship?

We hold that a shrewd business man, like Goldthwaite, would have never done such an unbusinesslike act if he had not intended these notes to be, just what on their face they purport to be, unconditional and absolute obligations to pay a certain sum at certain times. Certainly he is presumed to have intended the natural consequences of his acts.

Goldthwaite's promises to pay Macomber, as evidenced by the notes, were not collateral promises and without consideration. There is a marked difference between a promise which, without any interest in the subject matter of the promise in the promissor, might be collateral to the obligation of a third party, and

that which though operating upon the debt of a third party is also and mainly for the benefit of the promissor. Goldthwaite acknowledges that he was practically the Modoc Lumber Company—its interests were his interests—any benefit to the Modoc Lumber Company inured equally to the interest of Goldthwaite. Goldthwaite's promises, in the promissory notes sued on, were not collateral undertakings to secure the promises of the Modoc Lumber Company, but direct and personal ones to advance his own interests. He was a real and substantial party in interest to the performance of the contract. While the Modoc Lumber Company might be ultimately benefited by Goldthwaite signing the notes, Goldthwaite was primarily to be benefited—for the Modoc Lumber Company was but the pocket and conduit from which he derived his profits and assets. He is an original promissor—not a collateral undertaker.

The defendant contends and pleads that the notes here in suit were paid or discharged and the alleged limited guarantee which they constituted, released, when the notes of the San Francisco Board of Trade which had been purchased by Menefee from it in 1924, for thirty cents (30¢) on the dollar, were paid by the Modoc Lumber Company in full to the L. B. Menefee Investment Company, the then owner of the San Francisco Board of Trade notes of $178,592.77, on the 14th day of July, 1925. (See Paragraphs XIV and XV of Defendant's Amended Answer.)

In this connection, it will be noted that none of the money which defendant claims discharged and paid the Macomber ten notes here in suit, was received by

the San Francisco Board of Trade or by Sanborn, the trustee, in liquidation of the Macomber-Savidge Lumber Company, from the Modoc Lumber Company. It was all received by the L. B. Menefee Investment Company some two years after the San Francisco Board of Trade had sold the note of $178,592.77 to the L. B. Menefee Investment Company for thirty cents (30¢) on the dollar, which thirty cents, amounting to $16,500.00, was all the Macomber-Savidge Lumber Company ever got on its indebtedness or claim of $53,905.92. Defendant, in his oral argument in the Court below said he did not claim that the sale of the San Francisco Board of Trade notes to Menefee paid or discharged the notes sued on, but that the sale of July 14, 1925—all of the moneys of which were received and kept by Menefee and Goldthwaite—discharged the Goldthwaite notes, and that although nothing was received by the Macomber-Savidge Lumber Company, nevertheless, such transaction should be regarded as a payment.

Therefore, the only payment made "*through the San Francisco Board of Trade*", which, Macomber in the letter of February 28, 1922, agreed "to apply against the personal notes given to me (Macomber) by you (Goldthwaite) to the amount of said notes" was this thirty cents (30¢) on the dollar, or $16,500.00.

There remains but one other consideration for our determination in this matter. It is this—What payments "*made by the Modoc Lumber Company direct*" were "*to apply* against these ten personal notes given by the defendant to the plaintiff"?

Now, what was the subject of the agreement between Macomber and Goldthwaite as set out in the

letter of February 28, 1922? It was "our personal agreement" in connection with the claim of the Modoc Lumber Company, and the personal notes of Goldthwaite, and what payments made by the Modoc Lumber Company, *either direct or through the San Francisco Board of Trade* were to apply against the *personal* notes given by Goldthwaite to Macomber.

Direct payments made by the Modoc Lumber Company to whom? Surely to the only one that had any claim at that time—the Macomber-Savidge Lumber Company, or its trustee in liquidation—Sanborn—and over which only the parties were negotiating for the purpose of applying credits on the Goldthwaite personal notes.

How could the parties to this agreement have had any other idea in their minds. A consideration of the circumstances under which the agreement was made and the matter to which it relates, can lead to no other conclusion than that the parties had in mind only money payments to be made *directly to* the Macomber-Savidge Lumber Co. or to its trustee, Sanborn, because at the time it was made these were the only persons or obligations in which any direct payments could have been made. The Board of Trade note of one hundred seventy-eight thousand ($178,-000.00) dollars did not come into existence until June 16, 1922, some three and one-half months after this agreement of February 28, 1922, was made, and it was then not certain that it would ever come into existence, and the Macomber-Savidge Lumber Co. claim represented only a part of it.

This conclusion is inescapable when we consider the testimony at the trial, of defendant Goldthwaite that he then expected (February 28, 1922) to pay out through the profits derived from the operation of the mill of the Modoc Lumber Company the indebtedness of the Macomber-Savidge Lumber Company and his other creditors. (Trans. page 277.)

This testimony clearly shows that Goldthwaite only had in mind when he made the personal written agreement of February 28, 1922, with Macomber that the only direct payments to be credited on the ten personal notes here in suit, were money payments to be made directly by the Modoc Lumber Company to the Macomber-Savidge Lumber Company, or its trustee, Sanborn,—not payments made by the Modoc Lumber Company on notes given by it to the San Francisco Board of Trade months afterward, which notes were by the Board of Trade sold to the L. B. Menefee Investment Company in 1924 for thirty cents on the dollar and paid by the Modoc Lumber Company to the Menefee Investment Company in 1925, not one cent of which latter payment was ever received by the Macomber-Savidge Lumber Company, or its trustee, Sanborn.

How could he have had in mind on February 21, 1922, that through a sale made in July, 1925, the Modoc Lumber Company was to directly pay its indebtedness to the Macomber-Savidge Lumber Company. The mere statement of the proposition shows its absurdity.

Finally the claim referred to in the contract of February 28, 1922, between Goldthwaite and Macomber was the then existing claim of the Macomber-

Savidge Lumber Company against the Modoc Lumber Company not the notes to the Board of Trade that came into existence over three months later.

These notes at the date of their issuance, therefore, did not belong to the Macomber-Savidge Lumber Company, but to the San Francisco Board of Trade, and the 110 creditors were only beneficially interested in them to the extent of the amounts of their respective claims—the Macomber-Savidge Lumber Company's beneficial interest therein being only fifty-three thousand ($53,000.00) dollars, or thereabouts. On February 28, 1922, plaintiff and defendant could not refer to payment by the Modoc Lumber Company to the Board of Trade, or to Menefee.

Now after the Board of Trade sold these notes to the Menefee Investment Company, neither the Macomber-Savidge Lumber Company, Sanborn, its trustee, or the San Francisco Board of Trade had any claim against the Modoc Lumber Company. The ownership of the claim passed to the Menefee Investment Company, and from the date of the transfer the Menefee Investment Company was the only one who had any claim on these notes against the Modoc Lumber Company. It, therefore, follows that when in July, 1925, the Modoc Lumber Company paid the Board of Trade notes to the Menefee Investment Company, it was not paying any claim of the Macomber-Savidge Lumber Company, but the debt owed to the Menefee Investment Company by the Modoc Lumber Company.

The Court erred in finding that Macomber gave no consideration for the notes. We refer to our brief in

the foregoing point III as to our position on this point.

POINT IV.

ASSIGNMENT OF ERROR XI.

(Trans. p. 96.)

In paragraph V, of Plaintiff's Reply (Trans. p. 44) plaintiff alleged the assignment of the assets of the Macomber-Savidge Lumber Company to Crittenden, as trustee. This was an issue, and a material one, since it would show that on the date of signing and executing Defendant's Exhibit B—(the personal contract) and the notes, that plaintiff had no authority to make a contract with Goldthwaite for his company. Evidence was introduced upon this point. (Trans. pp. 153, 210, 212, 213.)

The Court should find on every material issue in the case.

Pon v. Wittman, 147 Cal. 280, 81 Pac. 984.

POINT V.

ASSIGNMENT OF ERROR XII.

(Trans. pp. 97, 98.)

The Court erred in making the conclusions of law set forth in Assignment XII, in that the said conclusions are insufficient to justify the findings, by reason of the fact that there is no finding that sets forth that an amount equal to the total of the notes given to the Board of Trade by the Modoc Lumber Co., has been paid. There is no allegation in defendants

pleading or proof supporting the same, that there was no consideration to him from plaintiff for the execution, and no allegation that the consideration alleged in defendant's affirmative defense was the sole consideration. The said finding of the Court is without foundation on evidence and erroneous, and the conclusion of law based upon it is therefore without sufficient support.

POINT VI.

ASSIGNMENT OF ERROR XIII.

(Trans. p. 98.)

The judgment based upon the finding based upon the assigned errors in admission and consideration of evidence, findings of facts, and conclusions of law is erroneous in that it based the said errors so assigned. The reasons why said judgment should be held erroneous, are set forth hereinbefore, and they are hereby referred to and made a part of this subdivision.

We respectfully contend that the judgment should be reversed.

Dated, San Francisco,
August 17, 1927.

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